

The Worst of Both Worlds?: Parental Involvement Requirements and the Privacy Rights of Mature Minors

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I. INTRODUCTION

Twenty-seven states are currently enforcing statutes that require parental involvement in the abortion decisions of minors.¹ These states require the minor (or her physician) to notify or obtain consent from a parent before proceeding with an abortion.² Parental involvement statutes are constitutionally required to have a "bypass procedure" that allows a minor to appear before a judge or independent decision-maker for the purpose of demonstrating that (1) she is mature, or (2) abortion without parental notification is in her best interests.³ The serious impact of these statutes upon the lives of adolescents cannot be

* I would like to acknowledge Professor Joan Krauskopf, Jefferson Liston, Stephen Zavestoski, John B. Heasley, and Cynthia Sanders for their helpful comments on earlier drafts of this Note. I would also like to thank my family and friends, especially Elizabeth Ziewacz, for their support and encouragement.

¹ See *American Academy of Pediatrics v. Lungren*, 12 Cal. 4th 1007, 1031 n.10 (1996). The states include: Alabama, Alaska, California, Georgia, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, West Virginia, Wisconsin, and Wyoming. *Id.* Parental involvement statutes, in ascending order of the burden they impose on the minor are: one-parent notification statutes, two-parent notification statutes, one-parent consent statutes, and two-parent consent statutes. See *Barnes v. Mississippi*, 992 F.2d 1335, 1338 (1993).

² The Supreme Court has held that parental notification and parental consent statutes are not equivalent. See *Bellotti v. Baird* (*Bellotti II*), 443 U.S. 622, 639-40 (1979). However, because the same issues are weighed in these cases, they are considered together in this Note. This approach is supported by commentators who have argued that the notion of "guided" choice which supports parental notification statutes in fact opens the door to parental persuasion and pressure that "effectively transforms a notification statute into a consent statute." Harvard Law Review Association, *Parental Notification Prior to Abortions for Immature Minors*, 95 HARV. L. REV. 142, 147 (1981).

³ See *Bellotti II*, 443 U.S. at 643-44. A judicial bypass procedure must satisfy four criteria as set forth by *Bellotti II*. *Id.* at 643-45. The bypass procedure must (1) allow a minor to demonstrate that she is mature enough to make an abortion decision in consultation with a doctor; (2) grant permission if the minor is not found mature, but an abortion is in her best interests; (3) preserve the minor's anonymity; and (4) proceed expeditiously. See *Causeway Medical Suite v. Ieyoub*, 905 F. Supp. 360, 363-64 (1995).

minimized. More than one million adolescents become pregnant each year.⁴ Of these pregnancies, more than half are carried to term, and slightly fewer than half are terminated.⁵ The percentage of pregnancies that result in abortion is higher for adolescents—especially young adolescents—than among adults because adolescents are more likely to experience an unwanted pregnancy.⁶

Since 1976, the United States Supreme Court has reviewed parental involvement statutes ten times.⁷ Social science analysis of adolescent abortion has paralleled the development of parental notification statutes. During this time, social scientists conducted numerous empirical studies analyzing adolescent abortion and the impact of parental involvement statutes.⁸ This research has produced substantial converging evidence regarding (1) the consequences of a decision to carry an unwanted teenage pregnancy to term compared to a decision to terminate the pregnancy, (2) the decisionmaking capabilities of minors, and (3) the psychological stress of the pregnancy disposition decision.⁹ Despite ample opportunity to examine this sizable and convincing body of research, the Court has yet to re-examine the assumptions

⁴ See Stanley K. Henshaw & Jennifer Van Vort, *Teenage Abortion, Birth and Pregnancy Statistics: An Update*, 21 FAM. PLAN. PERSP. 85, 85 (1989).

⁵ See *id.* "Teenagers terminate 42% of their pregnancies through abortion, twice the rate for women between the ages of twenty-five to thirty-four." Deborah Jones Merritt, *Ending Poverty By Cutting Teenaged Births: Promise, Failure, and Paths to the Future*, 57 OHIO ST. L.J. 441, 447 (citing Jacqueline D. Forrest & Susheela Singh, *The Sexual and Reproductive Behavior of American Women, 1982-1988*, 22 FAM. PLAN. PERSP. 206, 212 (1990)).

⁶ See Henshaw & Van Vort, *supra* note 4, at 85.

⁷ See *Planned Parenthood v. Casey*, 505 U.S. 833, 899 (1992) (upholding one-parent consent statute with a judicial bypass provision); *Ohio v. Akron Center for Reprod. Health*, 497 U.S. 502, 507-08 (1990) (upholding one-parent notice statute with bypass provision); *Hodgson v. Minnesota*, 497 U.S. 417, 457-58 (1990) (plurality) (upholding two-parent notification statute with a judicial bypass provision); *Hartigan v. Zbaraz*, 484 U.S. 171, 171 (1987) (*per curiam*); *Akron v. Akron Center for Reprod. Health*, 462 U.S. 416, 452 (1983), *overruled by Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (striking down a one-parent consent statute); *Planned Parenthood v. Ashcroft*, 462 U.S. 476, 494 (1983) (upholding a Missouri one-parent consent statute with judicial bypass); *H.L. v. Matheson*, 450 U.S. 398, 413 (1981) (upholding a one-parent notification statute); *Bellotti II*, 443 U.S. 622, 622 (1979) (striking down a Massachusetts law requiring two-parent consent because of its inadequate judicial bypass provision); *Bellotti v. Baird (Bellotti I)*, 428 U.S. 132, 151-52 (1976); *Planned Parenthood v. Danforth*, 428 U.S. 52, 83-84 (1976) (striking down a Missouri statute requiring one-parent consent).

⁸ For further discussion and analysis of these studies, see *infra* Part IV.

⁹ A "pregnancy disposition decision," as used in this Note, is the process of selecting whether to carry the pregnancy to term and keep the child, to carry the pregnancy to term and give the child up for adoption, or to terminate the pregnancy.

that are the foundation of its approval of parental involvement statutes.¹⁰

An analysis of substantial empirical data about the capabilities of pregnant minors exposes many flaws in the Supreme Court's conclusions in parental involvement cases. First, detailed documentation of the perils of teenage motherhood reveals the dangers in the state's obstruction of adolescent abortion.¹¹ Second, the presumption that children are incompetent serves as a paradigm for the Supreme Court's treatment of pregnant minors.¹² While the Court has rejected the proposition that pregnant minors must be presumed mature¹³ enough to make their pregnancy disposition decision, the weight of

¹⁰ That the Court has been willing to change its approach to issues in light of new facts or social science evidence is illustrated by *Casey*, 505 U.S. at 887-95. (For further discussion, see *infra* Part III.E.). The Court was also moved to re-evaluate the "separate but equal doctrine" in *Brown v. Board of Education*, 347 U.S. 483 (1954). In *Brown*, the Court was influenced by testimony from psychologists and educators that reported that segregation led to feelings of inferiority in African American youth. See Sandra M. Secrest, Note, *Minors' Rights to Abortion: Are Parental Notice and Consent Laws Justified?*, 66 U. DET. L. REV. 691, 710 n.118 (1989). Even in the most recent, seemingly sympathetic analysis of children's abortion rights by appellate courts, recent research has not been considered. In *Planned Parenthood v. Miller*, 63 F.3d 1452 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 1582 (1996), the Eighth Circuit Court of Appeals concluded that the state had no legitimate interest in imposing parental notification, a substantial obstacle, in the way of pregnant mature minors. However, the court in *Miller* referred these minors to the judicial bypass created by dated assumptions about the maturity and vulnerability of young women. See *id.* at 1452, 1468. In an April 1996 decision upholding the California parental involvement statute, the California Supreme Court rejected trial court findings concerning the decisionmaking capabilities of adolescents. See *American Academy of Pediatrics v. Lungren*, 12 Cal. 4th 1007, 1024 (1996). Witnesses and deponents at trial included medical professionals and many of the distinguished scientists cited in this Note. See *id.* at 1046-50. Although this testimony proved persuasive to the trial court, the California Supreme Court held that the justifications of parental involvement statutes are based on "normative assumptions about the family" and these social norms are not outweighed by a "battle of the experts" presenting generalized data regarding adolescents. *Id.* at 1024 n.7.

¹¹ For further discussion, see *infra* Part IV.A.

¹² See Richard E. Redding, *Children's Competence to Provide Informed Consent for Mental Health Treatment*, 50 WASH. & LEE L. REV. 695, 707 (1993) (citing Gerald P. Koocher, *Children Under the Law*, in REFORMING THE LAW: IMPACT OF CHILD DEVELOPMENT RESEARCH 6 (Gary B. Melton ed., 1977)); see also Harvard Law Review Association, *supra* note 2, at 145 (finding that the right to choose an abortion presupposes the capacity to make a mature choice).

¹³ "Maturity" is a problematic term throughout this Note. The problem of defining maturity in the adolescent abortion context is that most legislatures and the United States Supreme Court presume that adolescents are immature and may only be adjudicated to be mature. This Note rejects that presumption. This Note's definition of mature is the ability or

research provides a convincing challenge to this position by showing that minors exhibit adult-level reasoning.¹⁴ Furthermore, parental involvement does not seem to have the effect of facilitating better-reasoned abortion decisions.¹⁵ Third, to some extent, research confirms the Supreme Court's belief that minors are vulnerable when making an abortion decision. However, it also shows that the bypass procedure actually exacerbates this stress in two ways: (1) facing a judge in a bypass procedure is stressful and demeaning to the pregnant minor;¹⁶ and (2) when a mature minor does not wish to inform her parent, the few adults who have dedicated time to assist the young woman (including clinic staff, counselors, and attorneys) must waste time that could be spent counseling her to prepare her for a court appearance. In many senses, the failure of the Court to question its assumptions has left pregnant minors with the worst of both worlds: they get neither the full constitutional protection accorded to adults nor the solicitous treatment postulated for children.¹⁷

capacity to understand and reason about factors relevant to important decisions such as abortion. Therefore, this Note recognizes that adolescents are mature or immature in fact before they may be "found" to be mature by a judicial process.

¹⁴ See, e.g., Anita J. Pliner & Suzanne Yates, *Psychological and Legal Issues in Minors' Rights to Abortion*, 48 J. OF SOC. ISSUES 203, 214 (1992) (concluding that "most adolescents have achieved a sufficient level of competency by the age of fifteen to enable them to make mature and informed decisions regarding health-related issues"). For further discussion, see *infra* Part IV.B.

¹⁵ See, e.g., Robert W. Blum et al., *The Impact of a Parental Notification Law on Adolescent Abortion Decisionmaking*, 77 AM. J. PUB. HEALTH 619, 620 (1987) (concluding that there is a negligible difference in the percentage of parents involved in a minor's abortion decision between states with and states without parental involvement statutes). For further discussion, see *infra* Part IV.D.

¹⁶ See Pliner & Yates, *supra* note 14, at 210-11 (reporting that minors are often questioned about issues such as the morality of their sexual activity during a judicial bypass proceeding). For further discussion, see *infra* Part IV.D.

¹⁷ See *Kent v. United States*, 383 U.S. 541, 555-56 (1966). In this case, the Court was dealing with the application of the *parens patriae* doctrine to juveniles in the criminal justice system. *Parens patriae* ("parent of the country") refers to the state as guardian of persons under legal disability, such as minors. See BLACK'S LAW DICTIONARY 1114 (6th ed. 1990). This doctrine presents a parallel conflict with parental involvement statutes, as the Court's consideration is complicated by a desire to afford constitutional protections for children as well as to enforce their best interest. Justice Fortas commented that he did not believe that the juvenile law accorded children with full due process protections nor was it structured so as to rehabilitate children. See *Kent*, 383 U.S. at 554-55; see also Michael J. Dale, *The Supreme Court and the Minimization of Children's Constitutional Rights: Implications for the Juvenile Justice System*, 13 HAMLINE J. PUB. L. & POL'Y 199, 200 (1992). "[C]hildren should be entitled to both expanded constitutional rights and societal protection and . . . there is nothing inconsistent with the provision of both." *Id.*

Part II of this Note introduces the key legal issues involved in the Supreme Court's review of parental involvement statutes as they apply to the undefined privacy rights of *mature* minors. Part III analyzes the significant Supreme Court parental notification and consent cases as well as a recent Eighth Circuit Court of Appeals case, *Planned Parenthood v. Miller*.¹⁸ This analysis focuses upon the Court's standards of review, its antiquated assumptions with respect to minors, and its approach to issues presented in each case. This Part demonstrates that the Court must (1) revisit the issue of parental involvement, (2) reconsider its assumptions regarding the capacity of minors, and (3) thoroughly examine the burden of unwanted pregnancy and the risks associated with parental involvement. Part IV of this Note dissects the arguments of the Court by examining empirical research conducted on issues dispositive to the parental involvement cases. This Part concludes that expanded constitutional protection must be provided for meaningful adolescent privacy rights. Part V proposes one legislative solution that may accommodate the needs of mature minors, so that they may navigate "the best of both worlds" during the stressful period of their pregnancy disposition decision.

II. PARENTAL INVOLVEMENT STATUTES AND THE MATURE MINOR

The Supreme Court's divisiveness regarding the issue of abortion becomes even more acute in cases considering the privacy rights of minors. In these cases, the Court must weigh the reproductive rights of minors, the rights of parents to exercise authority over children, and the state's interest in assuring the best interests of minors.¹⁹ The Court's examination of the privacy rights of minors focuses upon (1) precedent regarding parental authority to control the household²⁰ balanced with the state's *parens patriae* interests,²¹ and (2) assumptions about the incompetence and vulnerability of minors.²² In each

¹⁸ 63 F.3d 142 (8th Cir. 1995).

¹⁹ See *Bellotti II*, 443 U.S. 622, 634-39.

²⁰ See *id.* at 637-38. The right to raise one's children is predicated upon privacy and due process protections. See *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). This theory illustrates the "property model" of the parent/child relationship, which asserts that "our culture makes assumptions about children deeply analogous to those it adopts in thinking about property." Satsie Veith, Note, *The Judicial Bypass Procedure and Adolescents' Abortion Rights: The Fallacy of the "Maturity" Standard*, 23 HOFSTRA L. REV. 453, 464 (1994) (quoting Barbara Bennett Woodhouse, "Who Owns the Child?": Meyer and Pierce and the Child as Property, 33 WM. & MARY L. REV. 995, 1042 (1992)).

²¹ See *Bellotti II*, 443 U.S. at 636.

²² See *id.* at 649.

parental involvement case, the Court's "incapacity theory"²³ was the basis for its approval of state regulation of adolescent abortion. On its face, the Court's incapacity theory invites psychological inquiry.²⁴ However, once the Supreme Court deemed its theory unassailable, it avoided empirical analysis, shunned convincing theoretical scrutiny, and instead relied upon the "pages of experience" to test the applicability of its assumptions.²⁵

In its line of parental involvement cases, the Court has held that (1) absolute, third-party veto is unconstitutional,²⁶ (2) one-parent consent is constitutional if an expeditious judicial bypass procedure is available,²⁷ and (3) one-parent notification is constitutional.²⁸ However, the Court has yet to decide the scope of the privacy rights of mature minors.²⁹ The Court has applied two separate standards of review in parental involvement cases, both less stringent than the "compelling state interest"³⁰ or "undue burden"³¹ tests required for adult women. The standard of review to be applied is dependent upon the standing of the party challenging the statute. When statutes have been challenged as applied to all minors, the Court has required that a "significant state interest"³² justify regulation of abortion. When the statute was challenged by an immature, unemancipated minor, the Court found that an "important state interest"³³ justified abortion restrictions. The Court's "sliding scale"

²³ "Capacity" in this Note is defined as "competence to consent for a particular treatment." See Redding, *supra* note 12, at 710 n.83.

²⁴ See Gary B. Melton & Anita J. Pliner, *Adolescent Abortion: A Psycholegal Analysis*, in *ADOLESCENT ABORTION: PSYCHOLOGICAL AND LEGAL ISSUES* 1, 9 (Gary B. Melton ed., 1986).

²⁵ See *id.*

²⁶ See *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976). Third-party veto may occur when parent and child disagree over the pregnancy disposition decision and the view of the parent prevails. See *id.* at 71.

²⁷ See *Bellotti II*, 443 U.S. at 643 (1979). "Judicial bypass procedure" is used in this Note in accord with the meaning set forth in *Bellotti II*, as a "term of art" including juvenile court dispositions, administrative agency hearings, and even less formal proceedings. *Id.* at 643 n.22.

²⁸ See *H.L. v. Matheson*, 450 U.S. 398, 413 (1981).

²⁹ See *Planned Parenthood v. Miller*, 63 F.3d 1452, 1459 (1995), *cert. denied*, *Janklow v. Planned Parenthood*, 116 S. Ct. 1582 (1996); *Matheson*, 450 U.S. at 414 (Powell & Stewart, JJ., concurring) (joining with the majority in stating that the decision left open to question whether the Utah statute unconstitutionally burdens a mature or best interests minor).

³⁰ See *Roe v. Wade*, 410 U.S. 113, 155-56 (1973), *modified by Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

³¹ See *Casey*, 505 U.S. at 895.

³² See *Planned Parenthood v. Danforth*, 428 U.S. 52, 75 (1976).

³³ See *Matheson*, 450 U.S. at 413.

standard of review demonstrates the possibility that mature minors would be extended the same privacy rights as adult women, and that the Court would therefore apply a strict standard of review.³⁴ Clearly, the maturity of a minor³⁵ dissolves some of the seemingly potent state concerns regarding the vulnerability of the adolescent and the subsequent necessity of parental involvement. This leaves a single state concern: the facilitation of well-reasoned abortion decisions. Parental involvement statutes disproportionately affect older, more mature minors. Therefore, it is critical that the Court define the scope of mature minors' privacy rights with respect to these statutes.

III. KEY SUPREME COURT PARENTAL INVOLVEMENT CASES

A. Background

Supreme Court parental involvement case law reflects the tension among (1) individual rights of young women to abort, (2) individual rights of parents to raise their children, and (3) the state's right, as *parens patriae*, to protect the welfare of children.³⁶ The individual right to an abortion is guaranteed to all women, including minors,³⁷ but it is not absolute.³⁸ Likewise, the right of a

³⁴ Commentators have suggested that *Matheson* eliminated the intermediate standard applied in *Bellotti II*:

If a minor is mature, she should be treated as an adult with respect to her constitutional right to choose to have an abortion. . . . A statute that applies to all minors, whether mature or immature, need not therefore be measured by the intermediate, "significant state interest" test. If the plaintiff has standing to challenge the statute as a mature minor, the Court should strike down the statute as applied to mature minors unless it is necessary to promote a compelling state interest.

Harvard Law Review Association, *supra* note 2, at 149. Unfortunately, this standard has not been applied by the Court in its review of parental involvement statutes since *Matheson*. See, e.g., *Casey*, 505 U.S. at 833.

³⁵ It is beyond the scope of this Note to resolve all issues regarding access for immature minors, although many suggestions made in Parts IV and V of this Note are equally applicable to those minors.

³⁶ See Kristen J. Brown, Note, *Bellotti v. Baird: The Impropriety of Extending the Invalid Assumptions of Bellotti to Determine the Constitutionality of Pure Notification Statutes*, 18 CAP. U. L. REV. 297, 299 (1989).

³⁷ See *Danforth*, 428 U.S. at 74-75.

³⁸ "[T]he right of personal privacy includes the abortion decision, but . . . this right is not unqualified and must be considered against important state interests in regulation." *Roe v. Wade*, 410 U.S. 113, 154 (1973), *modified by* *Planned Parenthood v. Casey*, 505 U.S. 833

parent to raise a child free from state interference is not beyond limitation.³⁹ The independent right of the state to intervene to assure the well-being of minors is justified by society's interest in protecting the welfare of children and the recognition that parental control or guidance cannot always be provided.⁴⁰

The acknowledgment of the legal identity of children in the realm of privacy rights is a significant departure from the common law, which equated minority and incompetency and denied the legal identity of children.⁴¹ "The basic rationale for depriving people of rights in a dependency relationship is that certain individuals are incapable or undeserving of the right to take care of themselves and consequently need social institutions specifically designed to safeguard their position."⁴² The strength with which this traditional view of children gripped the Supreme Court is evident in the fact that it did not expressly extend constitutional rights to children until 1967.⁴³ The extent to which the Court seriously considers the privacy rights of minors over traditional assumptions about children has been dispositive in parental involvement cases.

B. *Planned Parenthood v. Danforth: The Recognition of Minors' Privacy Rights*

The Supreme Court in *Planned Parenthood v. Danforth*⁴⁴ scrutinized a Missouri statute that required parental consent before a minor could obtain an abortion. The Court held that the Missouri legislature did not have constitutional authority to require parental consent that would have the effect of

(1992).

³⁹ See *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (affirming the conviction of a member of Jehovah's Witnesses for child labor violations for requiring her niece to sell religious magazines on street corners).

⁴⁰ See *Ginsberg v. New York*, 390 U.S. 629, 640 (1968) (affirming conviction for selling obscene materials to minors); see also *Prince*, 321 U.S. at 165 (recognizing that the state has an interest in protecting the welfare of children, in safeguarding them from abuses, and in assuring that they grow into free and well-developed adults); Barry C. Feld, *Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court*, 69 MINN. L. REV. 141, 148 (1984) ("*Parens patriae* [is] the right and responsibility of the state to substitute its own control over children . . . when the [natural parents are] unable or unwilling to meet their responsibilities . . .").

⁴¹ See George H. Russ, *Through the Eyes of a Child, "Gregory K.": A Child's Right to Be Heard*, 27 FAM. L.Q. 365, 369 (1993).

⁴² *Id.* at 369 (citing Hillary Rodham, *Children Under the Law*, 43 HARV. EDUC. REV. 487 (1973)).

⁴³ See *In re Gault*, 387 U.S. 1, 13 (1967) (holding that a child, merely on account of age, is not beyond constitutional protection).

⁴⁴ 428 U.S. 52 (1976).

a blanket, third-party veto.⁴⁵ The Court required the state to assert a "significant" state interest for regulating minors' abortion rights rather than the "compelling" state interest required for the abortion rights of adult women.⁴⁶ "The *Danforth* opinion thus reaffirmed the notion that the state's somewhat broader authority to regulate the activities of children than that of adults demands the use of a less rigorous standard in determining the scope of permissible limitations on children's constitutional rights."⁴⁷

Despite the application of an intermediate test, the Court weighed the privacy rights of pregnant minors heavily in reaching its decision.⁴⁸ The Court held that "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority[;]"⁴⁹ therefore, minors do possess constitutional rights. The Court protected an adolescent's right to make decisions regarding her reproductive future without consultation with or disclosure to anyone except her physician.⁵⁰ The state's interests⁵¹ in safeguarding the family unit and parental authority were not significant enough to justify parental consent because "[a]ny independent interest the parent may have in the termination of the minor daughter's pregnancy is not more weighty than the right of privacy of the competent minor mature enough to have become pregnant."⁵²

⁴⁵ See *id.* at 74 (plurality).

⁴⁶ See *id.* at 75.

⁴⁷ Brown, *supra* note 36, at 299.

⁴⁸ Clearly, *Danforth* was a departure from the traditional view of children as incapable and undeserving of privacy rights. The Court presumed that many minors have the ability to consent to pregnancy-related services by virtue of their pregnancy. Given this capacity to make a choice, minors can be presumed to have a privacy right to choose abortion.

⁴⁹ *Danforth*, 428 U.S. at 74. However, the Court emphasized that its holding "does not suggest that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy." *Id.* at 75.

⁵⁰ See *id.* This holding embodies the informational and decisionmaking privacy rights as they were articulated for all women in *Roe v. Wade*, 410 U.S. 113, 152-56 (1973), *modified* by *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

⁵¹ The Court found that the state concerns of safeguarding the family unit and preserving parental authority were permissible. Nevertheless, it rejected the proposition that giving the parent absolute power over the pregnancy disposition decision would add strength to the family unit. The Court also stated that granting parental veto power would cause further conflict in families that have already been fractured by the existence of the pregnancy. See *Danforth*, 428 U.S. at 75.

⁵² *Id.* Although it has since backpedaled on its position that a minor may be mature by virtue of her pregnancy, the Court's admission that a pregnant minor may be presumed competent is crucial to an examination of parental involvement. This presumption is consistent with state consent statutes that allow pregnant minors to consent to pregnancy-

C. Bellotti II: *The Creation of Alternative Procedures*

Three years later, in *Bellotti II*,⁵³ the Court concluded that a Massachusetts law requiring parental consent (or judicial approval after parental notification) unconstitutionally burdened the right of minors because it may have the effect of an absolute, third-party veto.⁵⁴ Although the Court invalidated the Massachusetts statute, it went on to delineate an alternative "bypass" procedure to adjudicate the maturity or best interests of a minor to avoid parental involvement.⁵⁵ The Court recognized the gravity of the abortion decision and the distinction between this decision and all others made during adolescence. "The need to preserve the constitutional right and the unique nature of the abortion decision, especially when made by a minor, require a State to act with particular sensitivity when it legislates to foster parental involvement in this matter."⁵⁶ For this reason, the Court held that if a State required a minor to seek the consent of one or more parents, it also must provide an expeditious bypass procedure.⁵⁷

In *Bellotti II*, the Court set forth the basis for distinguishing between the privacy interests of minors and adults. The Court found that constitutional rights of children are distinguishable from the rights of adults for three reasons: (1) the vulnerability of minors, (2) the decisionmaking capabilities of minors, and (3) the importance of parental involvement in childrearing.⁵⁸ These

related services. (For further discussion, see *infra* Part IV.B.) However, as parental involvement case law developed, the Supreme Court also chipped away at this presumption. In fact, in *Bellotti II*, the Court set forth an "incapacity theory" in support of parental involvement in abortion decisions. See *infra* notes 61-74 and accompanying text.

⁵³ 443 U.S. 622 (1979)

⁵⁴ See *id.* at 643 (quoting *Danforth*, 443 U.S. at 74). Justice Stevens's opinion in *Bellotti II* (in which Justices Brennan, Marshall, and Blackmun joined) challenged the Court's desires, in the interests of the minor, to publicize an individual's pregnancy disposition decision by subjecting it to public scrutiny and third-party decisionmaking. They argued that such a decision is violative of traditional privacy rights accorded in *Roe* and destroys the rights assured by *Danforth*. Further, a judicial bypass procedure would impose a burden at least as great as, and maybe greater than, obtaining parental consent. See *id.* at 654-55 (Stevens, J., concurring).

⁵⁵ See *Bellotti II*, 443 U.S. at 643. A minor is entitled to a proceeding to demonstrate either (1) that she is mature and well-informed enough to make an abortion decision independent of parental involvement, or (2) that the abortion would be in her best interests. This hearing must be sufficiently anonymous and expeditious, and ensure that parental consent does not in fact amount to a third-party veto. See *id.* at 643-44.

⁵⁶ *Id.* at 642.

⁵⁷ See *id.* at 643.

⁵⁸ See *id.* at 633-40.

concerns marked a clear retreat from the *Danforth* decision, which recognized a minor's presumptive maturity by virtue of her pregnancy.⁵⁹ The *Bellotti II* Court made clear that, "at least in some precisely delineated areas, a child . . . is not possessed [with the] full capacity for individual choice."⁶⁰ The Court held that, although children are generally protected by the same constitutional guarantees against government deprivations as adults, the state may adjust its legal system to account for vulnerability of children and their needs for "concern, . . . sympathy, and . . . paternal attention."⁶¹

The Court's second concern in *Bellotti II* was that a child is not able to make critical decisions in an informed, mature manner.⁶² For this reason, the Court resolved that the State "may limit the freedom of children to choose for themselves in the making of important, affirmative choices with potentially serious consequences."⁶³ The Court presumed that during childhood and adolescence, minors lack the "experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them."⁶⁴ Such presumptions, coupled with the Court's proposal for an alternative procedure, demonstrate a move to subordinate children's rights to both the state's *parens patriae* authority and to parental authority.

The concerns expressed in the *Bellotti II* opinion have influenced review of minors' privacy rights in all subsequent parental involvement cases.⁶⁵ The presumptions of the Court at first seem entirely plausible, but empirical research has directly challenged the wisdom and accuracy of these concerns.⁶⁶ Research has concluded, for example, that adolescents are capable of adult-level decisionmaking regarding medical and psychological treatment.⁶⁷

Furthermore, the Court's "incapacity theory" directly conflicts with trends in legislative treatment of juvenile criminals. As juvenile crime becomes more violent, legislatures and courts have reacted with harsh enactments, including

⁵⁹ See *Planned Parenthood v. Danforth*, 428 U.S. 52, 75 (1975).

⁶⁰ *Bellotti II*, 443 U.S. at 635–36 n.13 (quoting *Ginsberg v. New York*, 390 U.S. 629, 649–50 (1968) (Stewart, J., concurring)).

⁶¹ *Id.* (quoting *McKeiver v. Pennsylvania*, 403 U.S. 528, 550 (1971)).

⁶² See *Bellotti II*, 443 U.S. at 640.

⁶³ *Id.* at 635.

⁶⁴ *Id.* The Court made a similar recognition in *Ginsberg*, stating that "even where there is an invasion of protected freedoms 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults.'" *Ginsberg*, 390 U.S. at 634 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944)).

⁶⁵ See, e.g., *Planned Parenthood v. Miller*, 63 F.3d 1452, 1459–60 (8th Cir. 1995), cert. denied, *Janklow v. Planned Parenthood*, 116 S. Ct. 1582 (1996).

⁶⁶ For further discussion, see *infra* Part IV.

⁶⁷ See Lois A. Weithorn & Susan B. Campbell, *The Competency of Children and Adolescents to Make Informed Treatment Decisions*, 53 CHILD DEVELOPMENT 1589 (1982).

"adult consequences" such as mandatory bindover to adult court for juveniles age fourteen and older, consecutive sentences, and gun specifications.⁶⁸ These changes are based on the propositions that (1) children have become more mature at an earlier age, and (2) children need to be punished rather than rehabilitated.⁶⁹ In rejecting rehabilitation, legislators found children's decisionmaking capabilities to be fully mature and culpable; increased penalties are their just deserts. For example, California Governor Pete Wilson promoted "get-tough" legislation, stating that "[t]hese kids are street smart. They're gaming the system and it is in no way intimidating them."⁷⁰ Legislators no longer propose that a benevolent *parens patriae* authority intervene on behalf of the vulnerable juvenile offender as sentences are increased.⁷¹ Instead, they research the possibility of applying capital punishment to juveniles.⁷² The states' treatment of pregnant minors and juvenile offenders amounts to legislative dissonance. Supreme Court jurisprudence is clearly as inconsistent in its disparate treatment of juvenile offenders and pregnant minors:

[T]he juvenile justice system has come to mirror the Supreme Court in that it holds a child accountable as an adult where it perceives the need to do so (often based upon the belief that children are more mature than they used to be), while at the same time denying full constitutional protections to juveniles in compliance with Supreme Court mandates.⁷³

The third concern of the Court in *Bellotti II* involved the important role of

⁶⁸ For example, the Ohio General Assembly recently enacted statutes that include these provisions. See OHIO REV. CODE ANN. §§ 2151.26(B), 2151.355(A)(2), 2151.355(A)(7) (Baldwin Supp. 1996). These enactments are in accord with national trends. See *Panel Endorses Bill on Juvenile Crime*, WASH. TIMES, Feb. 9, 1996, at C4 (reporting "get tough" provisions that include bindover for juveniles age 14 and older); Matt Pommer, *New Code Will Send 10-Year-Olds to Court*, CAPITAL TIMES, Nov. 17, 1995, at A1 (reporting on a bill scheduled to be signed by Wisconsin Governor Tommy Thompson that would decrease the age from 12 to 10 at which juveniles are subject to trial and would also eliminate jury trials for juveniles).

⁶⁹ See Dale, *supra* note 17, at 201; see also Rachel Zimmerman, *House OKs Putting More Teens in Adult Prisons*, SEATTLE POST-INTELLIGENCER, Feb. 10, 1996, at 1 (reporting references to violent teens as "superpredators" in floor debate).

⁷⁰ Cyndee Fontana, *Wilson Pushes Juvenile Reforms: Get Tough Policy for Young Offenders Draws Fresno Support*, FRESNO BEE, Jan. 27, 1996, at B1.

⁷¹ Congress increased punishment of federal crimes committed by juveniles under the Federal Juvenile Delinquency Act. See Dale, *supra* note 17, at 203.

⁷² Juveniles aged 16 to 17 may be given the death penalty. See *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989).

⁷³ Dale, *supra* note 17, at 222.

the parent in childrearing.⁷⁴ The Court asserted that parents undertake a crucial societal role in teaching, guiding, and inspiring children by precept and example—a role crucial to the growth of minors into mature, socially responsible citizens.⁷⁵ The Court was justifiably unwilling to defer to parental rights outright in this case,⁷⁶ yet the Court did find the encouragement of parental consultation to be constitutionally permissible and highly desirable, assuming that parents were compassionate and supportive.⁷⁷ Yet this objective ignored the explosive number of abusive households and the documented connection between child abuse and teenage pregnancy. Such documentation includes, for example, a Pennsylvania study, which found that more than half of the forty-one adolescent mothers interviewed reported some history of child sexual abuse.⁷⁸ A study in Washington state had similar findings: sixty-two percent of 535 adolescent mothers surveyed had been raped or molested, before they became pregnant, by a perpetrator with a mean age of 27.4 years.⁷⁹

D. Parental Notification for Immature Minors in H.L. v. Matheson

The Court next confronted a Utah parental notification statute as applied to immature, unemancipated minors, in *H.L. v. Matheson*.⁸⁰ The *Matheson* Court

⁷⁴ 443 U.S. at 637. Further, the Court's primary consideration was that "the custody, care and nurture of [a] child reside first in the parents, whose primary function[s] . . . include preparation for obligations the state can neither supply nor hinder." *Id.* (original emphasis omitted) (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

⁷⁵ *See id.*

⁷⁶ *See id.* at 643–44.

⁷⁷ *See id.* at 640 n.20.

⁷⁸ *See Many Teen Mothers Were Abuse Victims*, UPI, Nov. 21, 1988, available in LEXIS, Nexis Library, ARCNWS file. Eleven of these minors reported multiple experiences of abuse. *Id.*

⁷⁹ *See Joe Klein, The Predator Problem*, TIME, Apr. 29, 1996, at 32, 32. Klein argues that girls who become pregnant are not immoral, premature tarts, but prey. In support of this he uses a 1990 California study that indicated that the younger the pregnant teen, the older the male that fathered the child. Among girls ages 11–12, the father was an average of 10 years older. *See id.*; see also Frank L. Mott, *Teen Parenting: Implications for the Mother and Child Generations*, 57 OHIO ST. L.J. 469, 473 (noting an analysis of national vital statistics data that revealed that about half of all men impregnating minors are above age 20) (citing J. David Landry & Jacqueline D. Forrest, *How Old Are U.S. Fathers?*, 27 FAM. PLAN. PERSP. 159, 159–65 (1995)).

⁸⁰ 450 U.S. 398 (1981). The minor who challenged the statute (a 15 year-old living with her parents) was found by the Court to lack standing to challenge the statute on overbreadth grounds because she made no claim to be emancipated nor did she show maturity. *See id.* at 406.

found that parental notification was reasonably calculated to serve state interests by (1) promoting family integrity, (2) encouraging parental consultation, and (3) allowing parents to supply medical information.⁸¹ The decision is based upon the Court's belief that not every minor can give effective consent to abortion.⁸²

Rather than require a significant state interest, the *Matheson* Court required only that a statute be "narrowly drawn" to serve "important state interests" when regulating immature, unemancipated minors.⁸³ Presumably, this standard is less stringent because the Court dealt only with the privacy interests of immature minors,⁸⁴ a situation in which the state *parens patriae* concern and desire to facilitate parental involvement are much stronger than in cases considering mature minors.⁸⁵ This downward adjustment of the significant state interest test applied in *Bellotti II*⁸⁶ indicates that the Court may apply a "compelling state interest" test to the privacy rights of mature minors.⁸⁷

The Court also refused to equate the status of pregnancy with the achievement of maturity to consent to abortion.⁸⁸ This issue was raised after the Appellant challenged the constitutionality of the Utah statute that allowed any pregnant adolescent to give informed consent for any pregnancy-related service, yet required an immature minor to notify a parent if she intended to terminate a pregnancy.⁸⁹ The Court justified this incongruity on two grounds. First, the Court held that the state may promote its interest in encouraging childbirth rather than abortion.⁹⁰ Even though this may directly conflict with the "minor[s] . . . interest in effectuating her decision to abort," her right is not absolute—especially given the additional state interest in facilitating parental authority over immature minors.⁹¹ Parental authority, however, is rejected in statutes that give all pregnant minors the legal capacity to give informed consent to pregnancy-related services. In addition, most states also allow minors to consent to confidential outpatient mental health services and confidential

⁸¹ *Id.* at 411.

⁸² *See id.* at 408 (citing *Planned Parenthood v. Danforth*, 428 U.S. 52, 75 (1976)).

⁸³ *Id.* at 413.

⁸⁴ *See id.* at 411.

⁸⁵ The minor in *Matheson* was described by the Court as a "girl of tender years, under emotional stress, . . . ill-equipped to make [the decision] without mature advice and emotional support." *Id.* at 410 (quoting *Bellotti II*, 443 U.S. at 657 (White, J., dissenting)).

⁸⁶ 443 U.S. 622 (1979).

⁸⁷ *See* Harvard Law Review Association, *supra* note 2, at 149.

⁸⁸ *See Matheson*, 450 U.S. at 408.

⁸⁹ *See id.* at 412 n.23 (citing UTAH CODE ANN. § 78-14-5(4)(f) (1977)).

⁹⁰ *See id.* at 419 (Powell and Stewart, JJ., concurring).

⁹¹ *Id.* at 419.

outpatient drug and alcohol treatment.⁹² Many states also recognize a common law "mature minor exception" to the incapacity theory.⁹³ This exception is based on the extent of the minor's (1) appreciation of the nature, extent, and probable consequences of conduct; and (2) appreciation of the nature of treatment, risks, and likelihood of successful results.⁹⁴

The Court's second justification for the encouragement of pregnancy is based on its belief that abortion is exceptionally risky for adolescents. The Court cited studies concluding that adolescent abortion is associated with significant health risks.⁹⁵ However, recent studies have specifically rebutted this conclusion. It is well documented that in the United States the risk of dying from complications related to childbirth is at least seven times greater than the risk from having an abortion.⁹⁶ The Court also concluded that the state interest in full-term pregnancies is different because "medical decisions to be made entail few—perhaps none—of the potentially grave emotional and psychological consequences of the decision to abort."⁹⁷ The Court cited a study which found that adolescents had markedly more severe psychological and emotional responses to abortion than adult women.⁹⁸ However, studies of women's

⁹² See, e.g., OHIO REV. CODE ANN. § 5122.04(A) (Anderson 1996) ("Upon the request of a minor fourteen years of age or older, a mental health professional may provide outpatient mental health services . . . without the consent or knowledge of the minor's parent or guardian."); OHIO REV. CODE ANN. § 3719.012(A) (Anderson 1996) ("[A] minor may give consent for the diagnosis or treatment by a physician . . . of any condition which it is reasonable to believe is caused by a drug of abuse, beer, or intoxicating liquor. Such consent shall not be subject to disaffirmance because of minority.").

⁹³ See, e.g., *Lacey v. Laird*, 139 N.E.2d 25 (Ohio 1956).

⁹⁴ See *id.* To meet the mature minor exception, the adolescent must be able to comprehend information regarding the nature of treatment, benefits, risks, and probable consequences of the surgery as they are fully disclosed by medical personnel. Further, the adolescent must be found reasonably mature of mind and capable of evaluating the intricacies of her treatment. See *id.*

⁹⁵ See *Matheson*, 450 U.S. at 411 n.20 (citing Deborah Maine, *Does Abortion Affect Later Pregnancies?*, 11 FAM. PLAN. PERSP. 98 (1979)).

⁹⁶ See Nancy Felipe Russo, *Adolescent Abortion: The Epidemiological Context*, in ADOLESCENT ABORTION, *supra* note 24, at 40, 59.

⁹⁷ *Matheson*, 450 U.S. at 412–13 (emphasis in original omitted). This argument was lambasted by Justices Marshall, Brennan, and Blackmun in the dissent. They cited pregnancy-related health services such as diagnostic tests that may reveal birth defects and decisions to undergo surgery to save the life of the child as stressful for the minor. It was clear to these Justices that "the mere fact of pregnancy and the experience of childbirth can produce psychological upheaval." *Id.* at 445 n.38 (Marshall, Brennan, & Blackmun, JJ., dissenting). Furthermore, the pregnancy disposition decision implicates other serious issues such as the future education, socioeconomic status, and employment of the adolescent. See *id.*

⁹⁸ See *id.* at 411 n.20; see also Nancy Adler et al., *Psychological Factors in Abortion: A*

attitudes and psychological well-being following abortion do not support the contention that abortion is followed by emotional or psychological stress,⁹⁹ and compared to adolescents carrying their pregnancy to term, adolescents who abort have been shown to have more adaptive and sound psychological and emotional health.¹⁰⁰

E. Planned Parenthood v. Casey

In 1992, the Supreme Court upheld a one-parent consent statute with judicial bypass in *Planned Parenthood v. Casey*.¹⁰¹ In *Casey*, the Court rejected spousal notification after considering the risks of abuse when a woman is forced to notify a spouse.¹⁰² While the relationships of parent/child and husband/wife are not equivalent, the risks of intra-family abuse to women and children are similar. Adult and adolescent women "have the same capacity to conceive and to be intimidated into not exercising their reproductive freedom."¹⁰³ The extensive examination of statistical and theoretical research findings about spousal abuse in the Court's opinion was not followed by a similar inquiry into child abuse.¹⁰⁴ The Court did not attempt to examine the

Review, 47 AM. PSYCHOLOGIST 1194 (1992). These authors identified biases in abortion literature arising from ideological viewpoints. They conclude that these biases caused researchers to expect severe negative responses to abortion and have led to methodological flaws in numerous studies. *See id.* at 1197. Such a flaw may explain the disparity between the study cited by the Court and the substantial weight of evidence presented in this Note.

⁹⁹ *See* Jeanne Marecek, *Consequences of Adolescent Childbearing and Abortion*, in ADOLESCENT ABORTION, *supra* note 24, at 96, 110.

¹⁰⁰ *See* Virginia L. Dixon, *Teenage Pregnancy: A Personality Comparison of Prenatal and Abortion Groups*, 38 DISSERTATION ABSTRACTS INT'L, 168A (1977); Ruth Falk et al., *Personality Factors Related to Black Teenage Pregnancy and Abortion*, 5 PSYCHOL. WOMEN Q. 737, 745 (1981); F. Kane & P. Lachenbruch, *Adolescent Pregnancy: A Study of Aborters and Non-Aborters*, 43 AM. J. ORTHOPSYCHIATRY 796, 800-02 (1973).

¹⁰¹ 505 U.S. 833 (1992).

¹⁰² *Id.* at 898.

¹⁰³ Leonard Berman, *Planned Parenthood v. Casey: Supreme Neglect for Unemancipated Minors' Abortion Rights*, 37 HOW. L.J. 577, 578 (1994) (arguing that minors and adults should be extended equal protection by the Court).

¹⁰⁴ *See Casey*, 505 U.S. at 891-92. In its examination of spousal abuse, the Court found that the women affected by spousal notification provisions in the statute (1) had good reason not to inform their husbands, (2) were justified based on empirical data, and (3) may be prevented from exercising their right to obtain an abortion. *See id.* at 891-94. Social science data suggests that adolescents face an even greater risk of experiencing violence than older mothers. A study conducted in Alaska, Maine, Oklahoma, and West Virginia indicated that "between 7.5% and 10.7% of all teenage mothers reported that they had been 'physically hurt

issues facing minors with similar thoroughness because the Court believed that children "[do] not realize that their parents have their best interests at heart."¹⁰⁵ The Court's approval of the bypass provision available to minors supports the view that "[a] minor must sustain much more onerous abortion regulations due to her legal disability as a minor."¹⁰⁶

Casey did include a sensitive examination of the privacy rights of all women. The Court recognized that its obligation in abortion cases is to define liberty, not to mandate a moral code.¹⁰⁷ Thus, the majority examined privacy issues to enable the provision of meaningful reproductive choice.¹⁰⁸ A similar approach would be essential to determining the privacy rights of minors. However, it seems clear that the Court feels compelled to allow the imposition of a moral judgment from a third party into the abortion decisions of adolescents. While the purpose of parental involvement statutes is not said to be the promotion of a certain moral position, in effect adolescents are subjected to the judge's morality during bypass proceedings.¹⁰⁹ For example, a Michigan probate judge stated that he would grant bypass permission only to victims of

by their husband or partner during the 12 months preceding childbirth'—and these are probably underestimates." Mott, *supra* note 79, at 474 n.17 (citing M.J. Vandecastle et al., *Physical Violence During the Twelve Months Preceding Childbirth—Alaska, Maine, Oklahoma, and West Virginia, 1990–91*, 43 MORBIDITY & MORTALITY WKLY. REP. 132, 132–36 (1994)).

¹⁰⁵ *Id.* at 895. Such a statement would be offensive if suggested to adult women. Commentators have argued that, in supporting parental authority, the *Casey* Court "clung to the last bastion of male reproductive-rights control—paternal authority in the home and surrogate state-fatherhood in the bypass proceeding—all the while proclaiming its altruistic concern for the safety and well-being of the minor." Berman, *supra* note 103, at 577. Furthermore, *Casey* recognizes a "husband's 'deep and proper concern and interest . . . in his wife's pregnancy,'" but does not find this sufficient to justify spousal involvement in the abortion decision. *Id.* at 587 (citing *Casey*, 505 U.S. at 895).

¹⁰⁶ Berman, *supra* note 103, at 584.

¹⁰⁷ *Casey*, 505 U.S. at 850.

¹⁰⁸ *See id.* In *Casey*, the Court recognized the burden of carrying a pregnancy to term: "[L]iberty of the woman is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear." *Id.* at 852. The Court acknowledged that the suffering of a pregnant woman is too intimate and personal for the state to regulate, regardless of society's feeling of entitlement to do so given the course of our history or culture. Again, such reasoning was not applied with similar weight to pregnant minors.

¹⁰⁹ "It is difficult to conceive of any reason, aside from a judge's personal opposition to abortion, that would justify a finding that an immature woman's best interests would be served by forcing her to endure pregnancy and childbirth against her will." Hodgson v. Minnesota, 497 U.S. 417, 475 (1990) (Marshall, J., concurring in part, concurring in the judgment in part, and dissenting in part).

incest and to white girls raped by black men.¹¹⁰ Several courts have also acknowledged that the trial judge's moral position clearly influenced the application of legal reasoning and discretion during the bypass proceeding.¹¹¹

F. Recent "Developments": Planned Parenthood v. Miller

Recent developments in parental involvement case law are not really "developments." In fact, the approach to parental involvement has been stagnant, relying on the arguments formulated by the Court in the 1970s. In light of recent developments in the status of minors in the law, the Court must revisit the underlying propositions of its parental notification cases. These propositions have been rendered questionable—if not erroneous—by social science data that has accumulated since the last time the Court appeared to seriously examine the issue of adolescent abortion rights.

In *Planned Parenthood v. Miller*,¹¹² the Eighth Circuit Court of Appeals recycled the Supreme Court's discussion of the decisionmaking capabilities of adolescents, concluding that immature minors are not capable of making informed, independent decisions about abortion.¹¹³ The South Dakota statute reviewed by the Eighth Circuit required the physician to notify a parent of a minor's decision to abort at least forty-eight hours before the procedure.¹¹⁴ The court concluded that a minor's choice to terminate a pregnancy may be

¹¹⁰ See Steven F. Stuhlbarg, Case Note, *When Is a Pregnant Minor Mature? When Is an Abortion in Her Best Interests? The Ohio Supreme Court Applies Ohio's Abortion Parental Notification Law*: In re Jane Doe 1, 566 N.E.2d 1181 (Ohio 1991), 60 U. CIN. L. REV. 907, 932 (1992) (citing Judge Bourisseau, UPI, Apr. 26, 1991).

¹¹¹ See *T.L.J. v. Webster*, 792 F.2d 734, 738–39 n.4 (8th Cir. 1986); In re Jane Doe, No. 93AP-428, slip op. at 1277 (Ohio Ct. App., Apr. 2, 1993). "The real point of the bypass procedure is the exercise of adult control of children, and particularly adult manipulation of children—made possible by children's political and legal vulnerability—to make political points: in this case, to take the brunt of political efforts to block abortion rights." Veith, *supra* note 20, at 474.

¹¹² 63 F.3d 1452 (8th Cir. 1992), *cert. denied sub nom Janklow v. Planned Parenthood*, 116 S. Ct. 1582 (1996). *Barnes v. Mississippi*, 992 F.2d 1335 (1993), is the only other parental involvement case to reach the United States Court of Appeals level since *Casey*. *Barnes* upheld a two-parent consent statute with a bypass provision. See *id.* at 1341. The rationale of *Barnes* parallels that set forth by the *Miller* court, with one notable difference: the standard of review of a facial challenge to a statute. See *infra* note 117.

¹¹³ *Id.* at 1460.

¹¹⁴ See *id.* at 1454 (citing S.D. CODIFIED LAWS ANN. § 34-23A-7). Three exceptions to this notification requirement were: (1) medical emergency, (2) a patient's certification that a parent has been notified, and (3) a physician's report that the minor has stated that she is an abused or neglected child. See *id.* at 1454–55 n.2.

regulated by the State, as long as the State provided an expeditious bypass proceeding.¹¹⁵

Although the disposition of *Miller* did not expand the privacy rights of adolescents, the Eighth Circuit's opinion is notable in two respects. First, the court evaluated the burden of parental involvement statutes only with respect to those minors who do not notify their parents. Large numbers of minors notify or consult with their parents about the abortion decision; thus no burden exists for the vast majority of young women.¹¹⁶ Rather than analyze the burden with respect to all minors, the court held that "the proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant."¹¹⁷ The court then analyzed whether, in a majority of

¹¹⁵ See *id.* at 1459 (citing *Bellotti II*, 443 U.S. 622, 643–44 (1979)). The U.S. District Court for South Dakota had concluded that a bypass procedure was necessary because "[s]tate and parental interests must yield to the constitutional right of a mature minor, or of an immature minor whose best interests are contrary to parental involvement, to obtain an abortion without consulting or notifying the parent or parents." *Planned Parenthood v. Miller*, 860 F. Supp. 1409, 1415 (D.S.D. 1994).

¹¹⁶ See *Miller*, 63 F.3d at 1458.

¹¹⁷ *Id.* (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 894 (1992)). The court in *Miller* adopted this approach after the Supreme Court applied this exact standard when it reviewed the burden of spousal notification statutes. *Casey*, 505 U.S. at 894. The federal circuit courts are split on the issue of whether the standard for a facial challenge to a statute was changed in *Casey*. *Id.* *U.S. v. Salerno* established that a challenge to the facial constitutionality of a statute must show that "no set of circumstances exists under which the act would be valid." 481 U.S. 739, 745. In *Miller*, the Eighth Circuit maintained that *Casey* effectively overruled *Salerno* for facial challenges to abortion statutes, even though it did not expressly overrule *Salerno*. *Miller*, 63 F.3d at 1458. *Miller* focuses on the statement in *Casey* that the law will operate as a substantial obstacle to a woman's choice to undergo an abortion: "[I]n a large fraction of the cases in which [it] is relevant, . . . [it] is an undue burden and therefore invalid." *Id.* (citing *Casey*, 505 U.S. at 894). The Eighth Circuit noted that the statute would not meet the *Casey* criteria, but would pass a facial challenge under the *Salerno* standard. *Id.*

In *Barnes v. Mississippi*, the Fifth Circuit continued to apply the *Salerno* standard, reasoning that the Court would not change a longstanding precedent sub silentio. See *Barnes*, 970 F.2d 12, 14 n.2 (5th Cir. 1992). The standard of review question was discussed at length in the opinions accompanying the Court's decision to deny certiorari in *Janklow v. Planned Parenthood*, 116 S. Ct. 1582. Justice Stevens, concurring in the denial, argued that "*Salerno's* rigid and unwise dictum has been properly ignored" in cases subsequent to *Casey*. *Id.* at 1583 (Stevens, J., concurring). Justices Scalia and Thomas, dissenting in the denial, argued that the unmistakable split between the Fifth and Eighth Circuits demands review regarding the *Salerno* question. See *id.* at 1585 (Scalia, J., dissenting). As noted in *Miller*, application of the *Salerno* standard would be fatal to a challenge to most parental involvement cases even given the arguments presented in this Note.

cases in which it may impact the minor, it is an undue burden.¹¹⁸

The *Miller* opinion is also notable for its examination of the burden imposed on mature minors by parental involvement statutes. First, the court found that "[t]he State runs afoul of the Constitution . . . when it attempts to give . . . power [to obstruct their daughter's decision to abort] to parents of mature daughters capable of making their own informed choices."¹¹⁹ The court said if an adolescent woman demonstrates the ability to make mature, informed consideration of her decision to abort, the state has no legitimate reason to impose more onerous restrictions on her than those applied to adult women.¹²⁰ Immature minors must also have the opportunity to demonstrate that an abortion would be in their best interest.¹²¹ The court found that because the State's justification was premised on the best interests of the minor, it no longer had justification for such additional regulation.¹²²

IV. THE MISSING LINK: A PSYCHOLEGAL ANALYSIS OF ADOLESCENT ABORTION

Supreme Court privacy jurisprudence is analogous to Newton's Third Law of Motion; for every action there is an equal and opposite reaction. Similarly, for every compelling argument about a woman's right to abortion, other justices pose an equally convincing opposing argument. This divisiveness is even more acute in cases considering the privacy rights of minors. However, the Justices' disagreement about adolescent abortion is not hopelessly intractable. In fact, many issues are clarified, if not resolved, by referring to empirical data. The Court in *Casey* undertook a thorough examination of the burden of unwanted pregnancy as well as the risks associated with the spousal notification statute. This part of the Note will show that parental involvement in abortion must be re-examined in the same manner.

¹¹⁸ See *Miller*, 63 F.3d at 1458.

¹¹⁹ *Id.* at 1460.

¹²⁰ See *id.* The Court concluded that "[f]or both mature and 'best interest' minors . . . the State has no legitimate interest in imposing a parental-notice requirement with the purpose or effect of placing a substantial obstacle in their paths when they seek pre-viability abortions." *Id.*

¹²¹ See *id.* The court recognized that parental involvement may function as a third-party veto. Parents may attempt to obstruct their daughter's attempt to obtain an abortion, therefore creating "a substantial obstacle for a large fraction of minors seeking pre-viability abortions." *Id.* at 1459-60.

¹²² See *id.* at 1460.

A. *Consequences of Childbearing and Abortion*

Throughout the parental involvement cases, the Court has asserted that the medical, emotional, and psychological consequences of an abortion are serious and can be lasting.¹²³ Although young women are slightly more likely to suffer postabortion stress,¹²⁴ abortion has fewer and less protracted consequences than carrying a pregnancy to term and raising the child.¹²⁵ Studies of women's attitudes and psychological well-being following abortion do not support the contention that abortion is followed by deep regret, self-reproach, and long-standing emotional damage.¹²⁶ Furthermore, the Court and legislatures seem to have neglected the fact that the pregnancy disposition does not involve health considerations alone. The far-reaching implications of an adolescent's decision whether to become a parent have not seriously been considered by the Court.¹²⁷ In fact, comparisons of personality functioning of adolescents who carry to term and those who abort generally show more adaptive, healthier functions in the latter group.¹²⁸

The Justices who support expanded privacy rights for minors frequently noted that a minor's choice to carry a pregnancy to term will affect her education, employment skills, financial resources, and maturity.¹²⁹

The legislative assumption behind . . . parental [involvement] statute[s] is that minor motherhood is a categorically sound institution that should be legislatively promoted. The . . . legislature [does not enact] parental involvement statutes for minors contemplating motherhood. Minor mothers do not have to prove to the state that they are mature or that motherhood is in their best interest. Despite a wealth of documentation suggesting that minor motherhood is fraught with peril . . . [t]he stance of anti-abortion legislators is "have your baby at all costs." Conversely, abortion seeking unemancipated minors are scrutinized and harassed for seeking to exercise their fundamental rights.¹³⁰

Sixty-eight percent of pregnancies during adolescence are unintended.¹³¹ It

¹²³ See, e.g., *H.L. v. Matheson*, 450 U.S. 398, 411 (1981).

¹²⁴ See *Marecek*, *supra* note 99, at 110.

¹²⁵ See *id.* at 109.

¹²⁶ See *id.* at 110.

¹²⁷ See *Berman*, *supra* note 103, at 597.

¹²⁸ See *supra* note 100 and accompanying text.

¹²⁹ See, e.g., *H.L. v. Matheson*, 450 U.S. 398, 440 (1981) (Marshall, Brennan, & Blackmun, JJ., dissenting) (quoting *Bellotti II*, 443 U.S. 622, 642 (1979)).

¹³⁰ *Berman*, *supra* note 103, at 585 (citation omitted).

¹³¹ See *Henshaw & Van Vort*, *supra* note 4, at 86. Similar findings in a 1988 National

is uncontroverted that bearing a child during teenage years will effect a woman's educational and occupational attainment, economic status, marital experience, and subsequent childbearing.¹³² Two studies have shown that, in their twenties, adolescent mothers had lower educational attainment than their nonparent counterparts, controlling for socioeconomic status, intellectual interests, and educational aspirations before pregnancy.¹³³ An adolescent mother will also have lower economic status, affected by her employment history, occupational status, household income, and welfare dependency.¹³⁴ The likelihood of welfare dependency is strongly influenced by the mother's age at first birth. Forty-six percent of women who gave birth before the age of fifteen, twenty-eight percent of those who gave birth between the ages of fifteen and seventeen, and fourteen percent of those who gave birth at eighteen or nineteen years are on public assistance.¹³⁵ Between twenty-five and thirty percent of mothers under the age of eighteen have a repeat pregnancy within two years.¹³⁶

Maternal and Infant Health Survey show that 22% of births to minors were "wanted" at the interview date, which was after the birth of the child. *See* Mott, *supra* note 79, at 476 (citing FRANK L. MOTT & STEPHEN V. QUINLAN, *MATERNAL-CHILD HEALTH DATA IN THE NLSU* (1991)); *see also* Merritt, *supra* note 5, at 443 n.12 (citing numerous studies from the 1970s to 1995 regarding unintended pregnancies).

¹³² *See* Marecek, *supra* note 99, at 98-102. Women who were teenage mothers are "less likely to complete their education, to be employed, to earn high wages, and to be happily married; and are most likely to have larger families and to receive welfare" than women who delay childbirth until their twenties. Deborah Jones Merritt, *supra* note 5, at 441 n.1 (citing National Research Council, 1 *RISKING THE FUTURE* 138 (1987)).

¹³³ *See* Josephina J. Card, *Consequences of Adolescent Childbearing for the Young Parent's Future Personal and Professional Life* 1, 58 (1977), microformed on ERIC No. ED 195, 901 (Educ. Resources Info. Ctr.); *see also* Mott, *supra* note 79, at 474 (citing Frank L. Mott & William Marsiglio, *Early Childbearing and Completion of High School*, 17 *FAM. PLAN. PERSP.* 234, 234-37 (1985)). Nineteen year olds bearing children have only a 68% chance of receiving a high school diploma compared with about 87% for a full cross section of young adults. *Id.*

¹³⁴ *See* Marecek, *supra* note 99, at 100.

¹³⁵ *See id.*

¹³⁶ *See* Mott, *supra* note 79, at 475 (citing Debra S. Kalmuss & Pearla B. Namerow, *Subsequent Childbearing Among Teenage Mothers: The Determinants of a Closely Spaced Second Birth*, 26 *FAM. PLAN. PERSP.* 149, 149-53 (1994)). These findings correspond with other studies that have shown that young women who have their first child in their teens are more likely to have a repeat pregnancy within a year than older women. *See also* Janet B. Hardy et al., *Long-Range Outcome of Adolescent Pregnancy*, 21 *CLINICAL OBSTETRICS & GYNECOLOGY* 1215, 1230 (1978). In a study of inner-city women, the rate of repeat pregnancies within a year was 47% for adolescents and 23% for women in their twenties. Further, the age of partners at marriage is related to marital stability. Marital instability is a

B. The Decisionmaking Capabilities of Adolescents

In *Bellotti II*,¹³⁷ the Court held that, because some minors lack the ability to make fully informed choices that consider both immediate and long-range consequences, parental involvement is desirable.¹³⁸ The Court also acknowledged that a young woman may be mature and well-informed enough to make a decision independent of parental consultation.¹³⁹ By mandating a bypass procedure to adjudicate maturity or best interests, the Court presumed that a minor does not have the capacity to consent to abortion. This presumption is challenged by substantial evidence that shows that adolescents are capable of adult-level decisionmaking regarding medical treatment and abortion.

Significant converging evidence from studies conducted since the late 1970s demonstrates that adolescents do not substantially differ from adults in their ability to understand and reason about medical treatment alternatives.¹⁴⁰ One study tested age-related difference in the pregnancy disposition decision of adolescent and adult patients at pregnancy clinics.¹⁴¹ The study found that

further cause of stress, and divorce has negative economic implications for women. See L. Bumpass & J. Sweet, *Differentials in Marital Instability: 1970*, 37 AM. SOC. REV. 754, 755, 761-62 (1972); Card, *supra* note 133, at 52, 58; Kristin A. Moore & Sandra L. Hofferth, *The Consequences of Early Childbearing: Research Summary* 1, 17 (1977), *microformed on* ERIC No. ED 149, 002 (Educ. Resources Info. Ctr.).

¹³⁷ 443 U.S. 622 (1979).

¹³⁸ *Id.* at 640.

¹³⁹ See *id.* at 643.

¹⁴⁰ See Melton & Pliner, *supra* note 24, at 18 (citing Thomas Grisso & Linda Vierling, *Minors' Consent to Treatment: A Developmental Perspective*, 9 PROF. PSYCHOL. 412 (1978); Gary B. Melton, *Developmental Psychology and the Law: The State of the Art*, 22 J. FAM. LAW 445, 463-66 (1984); CHILDREN'S COMPETENCE TO CONSENT (Gary B. Melton et al., eds., 1983); Lois A. Weithorn, *Developmental Factors and Competence to Make Informed Treatment Decisions*, in LEGAL REFORMS AFFECTING CHILD AND YOUTH SERVICES 85 (Gary B. Melton ed., 1982); see also Mary S. Griffin-Carlson & Kathleen J. Mackin, *Parental Consent: Factors Influencing Adolescent Disclosure Regarding Abortion*, 28 ADOLESCENCE 1 (1993). But see, Wanda Franz & David Reardon, *Differential Impact of Abortion on Adolescents and Adults*, 27 ADOLESCENCE 161 (1992); William Gardner et al., *Asserting Scientific Authority: Cognitive Development and Adolescent Legal Rights*, 44 AM. PSYCHOL. 895 (1989)).

¹⁴¹ See Catherine C. Lewis, *A Comparison of Minors' and Adults' Pregnancy Decisions*, 50 AM. J. ORTHOPSYCHIATRY 446, 446 (1980). Lewis sampled 26 adults and 16 adolescents at three California clinics. These subjects were making real and hypothetical pregnancy decisions. Based on the small sample and methodological limitations, Lewis cautioned against over-reliance on these findings.

adolescents and adults did not differ in four respects: (1) knowledge of the law and factors affecting a decision to abort, deliver and put the baby up for adoption, or carry to term and keep the baby;¹⁴² (2) the number of individuals consulted or expected to be consulted about her choice to deliver or abort;¹⁴³ (3) the tendency to consult the partner, parents, or members of peer group;¹⁴⁴ and (4) the expectation that conflicting advice will be received from each source, or the expectation that advice will favor pregnancy or abortion.¹⁴⁵

A subsequent study compared adolescents and adults in hypothetical medical treatment dilemmas.¹⁴⁶ This study found that adolescents as young as fourteen were able to articulate factual and inferential understanding of treatment alternatives as well as adults.¹⁴⁷ These findings are supported by studies of adolescent decisionmaking in other health-related contexts.¹⁴⁸

States recognize the decisionmaking capabilities of minors in consent laws that give all females, regardless of age, the right to consent to pregnancy-related medical services—with the stark exception of abortion. The Supreme Court has argued that carrying a pregnancy to term involves few of the potentially grave emotional and psychological consequences of the decision to abort.¹⁴⁹ However, carrying a pregnancy to term and many pregnancy-related services

"Adolescents are able to provide a medical history for abortions as well as any other group of individuals." *American Academy of Pediatrics v. Lungren*, 12 Cal. 4th 1007, 1046 n.2 (1996). As a practical matter, it is easier to get teens to disclose pertinent information such as previous abortions or sexually transmitted diseases outside the presence of parents. *Id.* (quoting testimony of Dr. Michael Policar, Board Certified in Obstetrics and Gynecology and family member, at the University of California, San Francisco Medical School).

¹⁴² See Lewis, *supra* note 141, at 447.

¹⁴³ See *id.* at 448.

¹⁴⁴ See *id.*

¹⁴⁵ See *id.* at 448. The study indicated some age-related differences between adolescents and adults. Minors were more likely to believe that their decision was the product of parental wishes, and were less likely to consult a professional about the decision. See *id.*

¹⁴⁶ See Weithorn & Campbell, *supra* note 67, at 1589.

¹⁴⁷ See *id.* at 1589. Given the hypothetical nature of these studies, it is arguable that the reasoning of both adults and adolescents would be different in a real decision.

¹⁴⁸ See generally Howard S. Adelman et al., *Competence of Minors to Understand, Evaluate, and Communicate About Their Psycho Educational Problems*, 16 PROF. PSYCHOL.: RES. & PRAC. 426 (1985) (concluding that minors can understand the risks and benefits associated with psychotherapeutic interventions); Michael C. Roberts et al., *Children's Perceptions of Medical and Psychological Disorders in Their Peers*, 10 J. CLINICAL CHILD PSYCHOL. 76 (1981) (finding that 9–13 year old minors were sensitive to variations in diagnosis, etiology, treatment, and prognosis among disorders).

¹⁴⁹ See *H.L. v. Matheson*, 450 U.S. 398, 412–13 (1981).

carry a higher risk than abortion¹⁵⁰ and bear similar, if not more severe, emotional consequences.¹⁵¹ The Court explained that this disparity stemmed from a different State concern about abortion.¹⁵² Yet it speaks to a glaring inconsistency: Is the state concerned with *how well* a teen decides or *what* she decides in making a pregnancy disposition decision?

The Court's holdings that presume the incapacity of adolescents are also influenced by a belief that it is unlikely that a minor will obtain adequate guidance and counsel from the physician performing the abortion procedure.¹⁵³ This conclusion is based on information provided to the Court in 1979 during its consideration of *Bellotti II*.¹⁵⁴ The landscape of abortion statutes has changed drastically since that time; now most states require informed consent and waiting periods for all women.¹⁵⁵ Furthermore, minors studied in Massachusetts, Rhode Island, and Minnesota were thoroughly counseled about their options by the time of their judicial bypass proceeding.¹⁵⁶

C. The Vulnerability of Adolescents

The "state interest" arguments advanced by the states in the parental involvement cases converge upon one element: the vulnerability of minors. Statistics support the urgency of the states' concerns. Approximately 500,000 babies are born to teenage girls each year.¹⁵⁷ Almost one million teens become pregnant each year.¹⁵⁸ Births to adolescents declined for two decades until

¹⁵⁰ See *id.* at 444 (Marshall, Brennan, & Blackmun, JJ., dissenting). It is well documented that in the United States the risk of dying from complications related to childbirth is about seven times the risk from having an abortion. See Russo, *supra* note 96, at 59.

¹⁵¹ For further discussion, see *supra* Part IV.A.

¹⁵² See *Matheson*, 450 U.S. at 412.

¹⁵³ See *id.* at 410.

¹⁵⁴ The *Bellotti II* Court quoted Justice Stewart's concurring opinion in *Danforth*, which stated that counseling occurred entirely on the day of the procedure and that minors were counseled in groups with adults for two hours, with only brief individual consultation with medical personnel who described the procedure, its risks, and birth control techniques. See *Bellotti II*, 443 U.S. 622, 641 n.21 (1979). Courts have also suggested that a physician will not act on behalf of the minor like a parent or a neutral judge because a physician "may have a direct, substantial pecuniary interest in reaching a conclusion . . . or a personal bias in favor of—or against—abortion." *American Academy of Pediatrics v. Lungren*, 12 Cal. 4th 1007, 1035 (1996).

¹⁵⁵ See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 884–87 (1992).

¹⁵⁶ See *Secrest*, *supra* note 10, at 708.

¹⁵⁷ See NATIONAL COMMISSION ON CHILDREN, *BEYOND RHETORIC: A NEW AMERICAN AGENDA FOR CHILDREN AND FAMILIES* 4 (1991).

¹⁵⁸ See *id.* at 33.

1986, when the trend reversed.¹⁵⁹ More than half of unmarried women from age fifteen to nineteen have engaged in sexual intercourse at least one time.¹⁶⁰ Three-quarters of unmarried women and 86% of unmarried men are sexually active by age nineteen.¹⁶¹

The vulnerability of a minor confronting a pregnancy disposition decision may lead to postabortion psychological stress. A 1993 study found that, compared to adult women, adolescent women are more likely to be dissatisfied with the choice of abortion.¹⁶² The study also reported that adolescent women were more likely (1) to have had abortions later in the gestational period, (2) to be dissatisfied with the services at the time of the abortion, (3) to feel forced by circumstances to have an abortion, and (4) to report being less informed or misinformed at the time of the abortion.¹⁶³ The authors of this study suggest that these factors indicate that "women contemplating an abortion [must] have a feeling of being fully informed, of having time to make an adequate decision, and of not being pressured to have an abortion if they do not believe it is appropriate for them."¹⁶⁴ Clearly, in families with good communication, an adolescent should be encouraged, but not forced, to involve her parents in order to have time to contemplate her decision in a supportive environment. However, while parental involvement may help alleviate these factors for some women, it is not essential to a formula to reduce postabortion stress. A counselor or medical professional could also provide for those young women who reject the involvement of their parents. This study demonstrates a clear relationship between management of preabortion indecisiveness and postabortion stress. Such a connection indicates that legislatively mandated injection of stress—in the form of parental involvement or a judicial bypass procedure—will only negatively impact the postabortion health of young

¹⁵⁹ *See id.*

¹⁶⁰ *See id.* at 223.

¹⁶¹ *See id.* Lack of education puts adolescents at risk as well. Forty percent of children are at risk of failure in school. *See id.* at 181–82. In 1988, dropouts were two times as likely to be unemployed as high school graduates and five times as likely as college graduates to be unemployed. Students with poor academic skills are nine times more likely to have a child out of wedlock and more than twice as likely to be arrested as academically advanced peers. *See id.*

¹⁶² *See Franz & Reardon, supra* note 140, at 161. This study compared adolescent and adult reactions to abortion using a sample obtained from women who had enrolled in support groups after having a negative reaction to abortion. It sampled 252 women from 42 states. The authors concede that this group is not representative of the entire population of women who have had abortions (because the sample was "self-selected" for postabortion stress). *Id.* Therefore this data cannot be generalized to all women who have had abortions.

¹⁶³ *See id.* at 166.

¹⁶⁴ *Id.* at 169.

women.

Researchers have identified the most critical factor affecting the psyche of an adolescent during her pregnancy disposition decision: her perception of social support in making her decision.¹⁶⁵ Perceived social support from her partner, parents, or peers has been reported as the single most important determinant of psychological reaction to abortion.¹⁶⁶ Children value the support of their parents and partners in this decision.¹⁶⁷ Furthermore, health care professionals have been found to provide crucial support.¹⁶⁸ Women who thought their physicians' attitudes were positive and who reacted positively to treatment by other health care workers were more likely to have a positive reaction to the procedure.¹⁶⁹ Despite some negative experiences, women who terminate an unwanted pregnancy are better adjusted and feel less negative about their experience than women who give babies up for adoption.¹⁷⁰ Teens interviewed two years after an adolescent abortion indicated that it led them to become more mature.¹⁷¹ This sample of minors also improved their contraceptive practices following an abortion.¹⁷²

A young, vulnerable, pregnant teenager deserves conscientious treatment by state legislatures. Psychological studies supplement the impressions of the court. A theoretical model that incorporates several empirical studies about abortion decisionmaking found that minors face an incredible amount of stress acknowledging their pregnancy, formulating and weighing disposition options, choosing an option, and becoming committed to that option.¹⁷³ This significant amount of preabortion stress for adolescents is comparable to that of adult women, who reported that indecision makes "the time between detection of pregnancy and the abortion . . . more stressful than the postabortion period."¹⁷⁴

¹⁶⁵ See Nancy E. Adler & Peggy Dolcini, *Psychological Issues in Abortion for Adolescents*, in ADOLESCENT ABORTION: PSYCHOLOGICAL AND LEGAL ISSUES, *supra* note 24, at 74, 87.

¹⁶⁶ See D.T. Moseley et al., *Psychological Factors That Predict Reaction to Abortion*, 37 J. CLINICAL PSYCHOL. 276 (1981).

¹⁶⁷ See Adler & Dolcini, *supra* note 165, at 87.

¹⁶⁸ See *id.* at 87-88.

¹⁶⁹ See David A. Evans & John P. Gusdon, Jr., *Postabortion Attitudes*, 34 N.C. MED. J. 271, 273 (1973); Leon Marder, *Psychiatric Experience with Liberalized Abortion Law*, 126 AM. J. PSYCHIATRY 1230, 1236 (1970); George S. Walter, *Psychologic and Emotional Consequences of Elective Abortion*, 36 OBSTETRICS & GYNECOLOGY 482, 487 (1970).

¹⁷⁰ See Adler & Dolcini, *supra* note 165, at 90.

¹⁷¹ See *id.* at 91.

¹⁷² See *id.*

¹⁷³ See *id.* at 75-82.

¹⁷⁴ *Id.* at 76-77. Physical risks exist as well. The most dangerous effect of the stressful decisionmaking period is the delay of obtaining pregnancy related services, whether it be

Although reluctant at first, fifty percent of minors found guidance from their mothers in formulating and weighing options.¹⁷⁵ However, these teens also reported the most conflict over the decision.¹⁷⁶ The causal relationship of the conflict and consultation is not clear: Did they need adult guidance and support because of the conflict or did adult guidance cause more conflict?¹⁷⁷ The younger the adolescent, the more likely she is to involve the parent.¹⁷⁸ Therefore, parental involvement statutes disproportionately affect older, more mature, adolescents.

In support of parental involvement statutes, the United States Supreme Court has held that these statutes (1) must be in place to sustain parental authority to raise their children,¹⁷⁹ (2) are desirable because some parents have profound moral and religious concerns about abortion,¹⁸⁰ and (3) allow parents to act in the best interests of their child.¹⁸¹ Justices who have dissented in parental involvement cases present strong arguments to the contrary. They assert that, for many minors, parental involvement creates family and personal problems.¹⁸² Second, they state that the parental involvement statutes extend the legal limits of parental authority rights, as parents are given the power to interfere with their daughter's decision or to limit her access to abortion services.¹⁸³ Third, they argue that a minor may also "confront physical or

prenatal care or an abortion. Since an adolescent is likely to deny the initial determination of pregnancy and take longer to select an alternative, delay becomes a major factor in the psychological and emotional well-being of the women. Second trimester abortions are more risky and more expensive. Furthermore, patients who delay abortions until the second trimester feel a greater sense of loss than women who undergo an earlier abortion, regardless of age. *See id.* at 86.

¹⁷⁵ *See id.* at 80.

¹⁷⁶ *See id.*

¹⁷⁷ *See id.* at 80-81.

¹⁷⁸ *See id.* at 81.

¹⁷⁹ *See H.L. v. Matheson*, 450 U.S. 398, 410 (1981) (citing *Ginsberg v. New York*, 390 U.S. 629, 639 (1968)).

¹⁸⁰ *See id.* at 409 (citing *Bellotti II*, 443 U.S. 622, 640 (1979)).

¹⁸¹ *See id.*

¹⁸² *See, e.g., id.* at 437 (Marshall, Brennan, & Blackmun, JJ., dissenting).

¹⁸³ *See id.* at 438 (Marshall, Brennan, & Blackmun, JJ., dissenting). In *LaPorte*, Pennsylvania, a woman was charged with interference with custody in the "first prosecution in the country of an adult who drove a [minor] to another state [to obtain] an abortion" and avoid a parental involvement statute. Sandy Banisky, *Trial Ties Parental Custody, Abortion; Woman Who Helped Girl Get Abortion Is on Trial in Pa.*, BALTIMORE SUN, Oct. 29, 1996, at 1A. This case has attracted the attention of both sides of the debate regarding adolescent abortion rights. Proponents of restrictive legislation point out that the woman was the step-mother of the 19 year-old man who impregnated the 13 year-old girl, stating that this is a

emotional abuse, withdrawal of financial support, or actual obstruction of the abortion decision.”¹⁸⁴ In *Planned Parenthood v. Casey*, the Court evaluated the impact of spousal notification upon women who did not want to notify spouses.¹⁸⁵ The *Casey* Court was clearly influenced by statistics that demonstrated the crisis of domestic violence. Given these statistics, the Court could not assume that spouses would always regard the best interests of the women or that a husband would respect his wife’s choice in all families. Similarly disturbing statistics reveal a comparable problem with child abuse:

Each year there are approximately 1,003,600 cases of child neglect and 675,000 cases of child abuse, resulting in the deaths of 1100 children. Yearly, almost 160,000 children receive serious injuries as a result of maltreatment. These injuries include loss of consciousness, arrested breathing, broken bones, third degree burns, schooling loss, and loss of special education services. Additionally, 952,600 children sustain moderate injuries or impairments. These include bruises, depression, and emotional distress that lasts at least forty-eight hours. . . . The increase in the number of reports of child abuse in recent years has been astronomical.¹⁸⁶

The perpetrators of this abuse are rarely strangers to the children. In fact, “[i]n more than ninety percent of the cases the child is victimized . . . by a parent, other family member, or friend known to the child.”¹⁸⁷ Information regarding an adolescent’s pregnancy may create or intensify an abusive situation. The petitioners in *Planned Parenthood v. Miller* asserted that a “non-abusive parent-child relationship can become abusive or neglectful after the parent learns of the daughter’s pregnancy or desire to have an abortion.”¹⁸⁸ Planned Parenthood also argued that the best interests of abused minors will not be protected by the state because, if the abuser instills secrecy in the child or the child is protective of her abuser, certain exceptions to parental involvement may

disturbing, but not rare, circumvention of parental authority. *Id.* Opponents of restrictions to adolescent abortion rights point out that the woman did not assist the pregnant teen in her pregnancy disposition decision, she merely transported her to the clinic because she felt that an adult should make the long distance trip. Opponents maintain that this case may mark a disturbing trend to further restrict adolescents’ access to abortion services. *Id.*

¹⁸⁴ *Matheson*, 450 U.S. at 438–39 (Marshall, Brennan, & Blackmun, JJ., dissenting).

¹⁸⁵ *Planned Parenthood v. Casey*, 505 U.S. 833, 887–98 (1992).

¹⁸⁶ Raymond O’Brien, *An Analysis of Realistic Due Process Rights of Children Versus Parents*, 26 CONN. L. REV. 1209, 1234 (1994) (citations omitted).

¹⁸⁷ *Id.* (quoting CHILDRENS DEFENSE FUND, *A CHILDRENS DEFENSE BUDGET: FY 1988, AN ANALYSIS OF OUR NATION’S INVESTMENT IN CHILDREN* 175 (1987)) (emphasis added).

¹⁸⁸ *Planned Parenthood v. Miller*, 63 F.3d 1452, 1462 (8th Cir. 1995).

not be availed to her.¹⁸⁹

D. *Impact of Notification and Consent Statutes*

The general objectives of parental involvement statutes and the accompanying bypass procedures are (1) to assure that minors make well-reasoned pregnancy disposition decisions with their parents, and (2) to assure that a minor who does not want to involve her parents is mature or seeks an abortion in her best interests. Various studies have been able to gauge the impact of parental notification and consent statutes and their judicial bypass procedures. These studies have concluded that parental involvement laws are not functioning as intended in (1) effectively compelling young women to involve their parents, (2) thoroughly examining and accurately determining the maturity of a minor, or (3) treating the minor with sensitivity and concern.

Parental involvement statutes have not been able to increase the number of parents involved in a minor's pregnancy disposition decision.¹⁹⁰ Prior to the enactment of the Minnesota parental notification statute, thirty-seven percent of women informed their mothers and twenty-six percent informed their fathers.¹⁹¹ Younger women were more likely than older adolescents to inform their parents.¹⁹² After Minnesota enacted a parental notification statute,¹⁹³ a study compared adolescent abortion in Minnesota and Wisconsin (where there was no notification or consent statute).¹⁹⁴ Only slightly more minors notified both parents in Minnesota (43.5%) than in Wisconsin (32.4%); almost the same percentage notified at least one parent (65.3% and 62.1%, respectively).¹⁹⁵ Two studies, one in Michigan and one nationwide, support the data of the Minnesota/Wisconsin comparison.¹⁹⁶ In Michigan, a state with no notification requirement, fifty-seven percent of pregnant minors involved their parents.¹⁹⁷

The judicial bypass procedure remains problematic because it is viewed by

¹⁸⁹ See *id.* at 1463.

¹⁹⁰ See Freddie Clary, *Minor Women Obtaining Abortions: A Study of Parental Notification in a Metropolitan Area*, 72 AM. J. PUB. HEALTH 283, 284-85 (1982).

¹⁹¹ See *id.* at 284.

¹⁹² See *id.*

¹⁹³ This statute required two-parent notification and was found unconstitutional in *Hodgson v. Minnesota*, 497 U.S. 417 (1990).

¹⁹⁴ Blum et al., *supra* note 15, at 619.

¹⁹⁵ See *id.*

¹⁹⁶ See Secrest, *supra* note 10, at 699-700.

¹⁹⁷ See *id.* The tendency to involve at least one parent was similar for minors choosing abortion (56%) and those who decided to carry the pregnancy to term and keep the child (53%). See *id.*

almost everyone involved—except the distressed teen—as a rubber stamp procedure. In fact, data indicate that “courts cannot discriminate mature from immature minors, and that minors are put at greater risk by delaying the abortion in order to obtain third-party consent.”¹⁹⁸ One judge stated that his role was simply a routine clerical one.¹⁹⁹ In the opinion of another judge, the only achievement of the bypass procedure was to erect another barrier to minors’ access to abortion.²⁰⁰ A Massachusetts study found negligible variance in the determination of maturity or best interests.²⁰¹ In 477 proceedings, all but nine adolescents were adjudged mature; of those nine, eight were allowed abortions in their best interests.²⁰² This study also found that hearings lasted on average 12.12 minutes, with ninety-two percent of them taking no more than twenty minutes.²⁰³ This data is supported by testimony presented in *Hodgson v. Minnesota*, in which the trial court found that, of 3,573 judicial bypass petitions filed from August 1, 1981, to March 1, 1986, all but fifteen were granted.²⁰⁴

The indirect sources of information for the Massachusetts study (appellate reviews and lawyers’ affidavits)²⁰⁵ revealed horrifying reports of treatment of minors during bypass proceedings.²⁰⁶ Affiants demonstrated that questions in the proceeding often “served primarily to upset minors rather than to generate helpful information.”²⁰⁷ For example, some judges questioned minors regarding the morality of their sexual activity.²⁰⁸ One adolescent was asked “to give a definition of a ruptured uterus and to explain how hemorrhaging may lead to death.”²⁰⁹ Furthermore, judges have stated that they come to a

¹⁹⁸ Pliner & Yates, *supra* note 14, at 203.

¹⁹⁹ See Secrest, *supra* note 10, at 704.

²⁰⁰ See *id.*

²⁰¹ See *id.* at 702 (citing Suzanne Yates & Anita J. Pliner, *Judging Maturity in the Courts: The Massachusetts Consent Statute*, 78 AM. J. PUB. HEALTH 648 (1988)).

²⁰² See Pliner & Yates, *supra* note 14, at 209.

²⁰³ See *id.*

²⁰⁴ See *id.* at 207. In the ten years the Massachusetts parental involvement statute has been enforced, courts have ruled on 9,000 bypass petitions, “of which all but 13 were granted. All 13 denials were appealed and only one was affirmed (in that case parents gave consent and the minor obtained the abortion).” *American Academy of Pediatrics v. Lungren*, 12 Cal. 4th 1007, 1051 n.12 (1996).

²⁰⁵ Affidavits were solicited by Planned Parenthood League of Massachusetts for a lawsuit challenging the constitutionality of the bypass provision. See Pliner & Yates, *supra* note 14, at 211.

²⁰⁶ See *id.* at 207.

²⁰⁷ *Id.* at 211.

²⁰⁸ See *id.*

²⁰⁹ *Id.* Judges have also asked minors questions such as: How would it feel to have a dead child? Are you aware that abortion may affect your fertility? See Deborah L. Rhode,

conclusion regarding maturity for reasons such as the adolescent's possession of general information and vocabulary skills, and the adolescent's appearance and degree of articulateness.²¹⁰ These findings are supported by anecdotal evidence from juvenile courts in Ohio, where pregnant teens are often judged as automatically immature.²¹¹ For example, courts in judicial bypass decisions may determine the maturity of the teen based on her conduct (sexual activity, for example) rather than on her maturity or best interests.²¹² Specifically, a juvenile court judge in Stark County, Ohio, stated that he considered any sixteen-year-old who got pregnant to be immature.²¹³ Clearly, others perceive a teen's decision to abort as demonstrating a mature response to the situation,²¹⁴ given the impact of single motherhood upon her education, socioeconomic status, and development of her child.²¹⁵

Such findings support the argument that confidence in the judicial bypass procedure is unwarranted because of (1) the questionable ability of judges to make sound decisions on behalf of individual pregnant minors, and (2) the need for the careful decisionmaking, sensitivity, and stress reduction for the adolescent.²¹⁶ This evidence shows that mandatory third-party decisionmaking cannot advance the state's concern for adolescents by adjusting to their needs of concern, sympathy, and careful attention.²¹⁷

Bypass procedures also cause delay. In Massachusetts, 4.2 days on average passed between the date of contacting an attorney and the date of the

Adolescent Pregnancy and Public Policy, in *THE POLITICS OF PREGNANCY: ADOLESCENT SEXUALITY AND PUBLIC POLICY* 301, 320 (Annette Lawson & Deborah L. Rhode eds., 1993).

²¹⁰ See Pliner & Yates, *supra* note 14, at 210-11.

²¹¹ See Stuhlbarg, *supra* note 110, at 930. After Judge George Twyford, a juvenile court judge in Franklin County, Ohio, rejected all of the bypass petitions before him (most of which were struck down by the court of appeals), the court of appeals suggested that Judge Twyford had preconceived notions regarding the maturity of the pregnant minors. "As a result [the court] strongly encouraged any judge who cannot fairly and impartially consider [the important issues presented at the bypass hearing] to recuse himself from any involvement in such proceedings." *In re Jane Doe*, No. 93AP-428 slip op. at 2 (Ohio Ct. App. Apr. 2, 1993).

²¹² See Stuhlbarg, *supra* note 110, at 927.

²¹³ See *id.* at 932 n.108 (relating phone interview with Director of Planned Parenthood of Stark County, Ohio, regarding comments made during hearing of *In re Jane Doe-I*, No. JU-73642 (Ohio C.P. Oct. 10, 1990)).

²¹⁴ See Melton & Pliner, *supra* note 24, at 19.

²¹⁵ See *id.* at 17.

²¹⁶ See *id.* at 28-29.

²¹⁷ See *Bellotti II*, 443 U.S. 622, 635 (1979) (citing *McKeiver v. Pennsylvania*, 403 U.S. 528, 550 (1971)).

hearing.²¹⁸ Any delay will be significant with a population that has already been found to delay the pregnancy disposition decision. For example, in Minnesota, almost all bypass proceedings are conducted in St. Paul, Minneapolis, or Duluth. Minors may have to make a round trip of up to five hundred miles to exercise the bypass option.²¹⁹ Parental notification and consent statutes have been found to cause more young women to travel out of state to obtain abortions.²²⁰ In Massachusetts, before the statute was implemented, few women traveled out of state for abortions, but in the first month of implementation, 130% more minors obtained abortions out of state.²²¹

V. MAKING THE BEST OF A BAD SITUATION: AN ALTERNATIVE TO PARENTAL INVOLVEMENT STATUTES

States that regulate adolescents' access to abortion claim they are protecting the best interests of minors. Numerous studies have shown that minors are capable of adult decisionmaking, but, like adult women, they undergo significant stress during their pregnancy disposition decision. At the peak of this stress, states force minors to either inform their parents or appear before a judge. It is hardly an advancement of the "best interests" of the minors who choose judicial bypass to undergo a demeaning, rubber-stamp judicial proceeding to prove their ability to consent.

The answer to providing the "best of both worlds" in an already difficult situation lies in the counselors and medical professionals that the young woman contacts to examine the option of abortion. Minors studied in Massachusetts, Rhode Island, and Minnesota were thoroughly counseled about their options by the time of their judicial bypass proceeding.²²² Further, the state takes counseling time away from the minor if she has to be prepared for a bypass proceeding. States trust medical personnel to properly counsel minors about their options for other, potentially serious pregnancy-related medical procedures and likewise trust that these minors are able to competently confer with professionals. However, courts and legislatures believe that counseling for abortion occurs entirely on the day this procedure is to be performed, and that it is limited to descriptions of the procedure, possible complications, and birth control techniques. Courts and legislatures are also afraid that young women

²¹⁸ See Secrest, *supra* note 10, at 703 (citing Yates & Pliner, *supra* note 201, at 648).

²¹⁹ See *id.*

²²⁰ See *id.* at 700-01 (citing Virginia G. Cartoof & Lorraine v. Klerman, *Parental Consent for Abortion: Impact of the Massachusetts Law*, 76 AM. J. PUB. HEALTH 397, 398 (1986)).

²²¹ See *id.*

²²² See Secrest, *supra* note 10, at 708.

are not capable of interacting with a physician if they are obtaining abortions.²²³

As an alternative, commentators have suggested lowering the age of consent to an age low enough to ensure that most mature minors will be able to avoid a judicial proceeding.²²⁴ They argue that the court has not required a case-by-case determination of maturity, and has also rejected arbitrary age definitions of maturity as high as eighteen.²²⁵ Other commentators have argued that pregnancy alone should be an objective standard to emancipate a minor from parental authority.²²⁶

The trend in regulating access to abortion is to require informed consent, which the state requires medical professionals to receive from a woman seeking an abortion.²²⁷ A similar process can be applied to adolescent women, and the state should entrust medical professionals to assess the competency of the young pregnant woman seeking abortion. The medical profession already has fixed standards for such a professional judgment.²²⁸ The factors already considered by medical professionals in assessing competency include: (1) factual understanding of the problem and the treatment alternatives, (2) rational decisionmaking processes, (3) an appreciation for the personal implications of the decision, (4) ability to make and communicate a choice, (5) reasonableness of the choice, and (6) general competence.²²⁹ Uniform adherence to these standards will continue to enforce the state's concern for the minor's vulnerability and her ability to make informed decisions. However, it will not do so at her expense, because she will avoid unnecessary and demeaning judicial proceedings.

The American Medical Association has recommended similar guidelines for physicians counseling pregnant minors.²³⁰ First, the AMA recommends that physicians encourage minors to discuss their reproductive options with their parents.²³¹ This step is to insure that minors are not overestimating parental anger about their pregnancy.²³² Second, the AMA concurred with the National Research Council and the Society for Adolescent Medicine in its statement that

²²³ See *Bellotti II*, 443 U.S. 622, 641 n.21 (1979).

²²⁴ See Harvard Law Review Association, *supra* note 2, at 150-51.

²²⁵ See *id.*

²²⁶ See Veith, *supra* note 20, at 478-79.

²²⁷ See *Planned Parenthood v. Casey*, 505 U.S. 833, 887 (1992).

²²⁸ See Redding, *supra* note 12, at 704.

²²⁹ See *id.* at 710-11.

²³⁰ See Council on Ethical and Judicial Affairs, American Medical Association, *Mandatory Parental Consent to Abortion*, 262 JAMA 82, 82 (1993).

²³¹ See *id.* at 83.

²³² See *id.*

adolescents should not be required to involve their parents in their pregnancy disposition decision.²³³ Third, the AMA found research pertaining to the decisionmaking capabilities of adolescents convincing and suggested that physicians treat adolescents like adult patients capable of mature decisionmaking. At this stage, physicians should ensure that minors have made an informed decision after giving careful consideration to the issues involved, and may be encouraged to consult with other adults if parents are not going to be involved.²³⁴

VI. CONCLUSION

The Court claims that states must approach the privacy rights of minors with respect and sensitivity. However, in attempting to do so itself, the Court has coldly disregarded the realities that confront young, pregnant women. It has claimed to rely on "pages of experience" to evaluate the capacity of minors, but has instead relied on faulty, outdated justifications to deny privacy rights to adolescents. The "pages of experience" used by the Court to justify parental involvement must be turned forward to the 1990s. The compelling research presented in this Note demonstrates that young women forced into parental involvement or judicial bypass proceedings are generally mature enough to make a pregnancy disposition decision and will typically experience less stress and fewer consequences from abortion than from carrying to term. The Court has maintained that statutes mandating parental involvement protect the vulnerability of minors. Yet, a young woman who does not want to involve her parents is coerced into carrying an unwanted pregnancy to term, or forced into an often demeaning bypass procedure—both of which compound the vulnerability that the statutes purport to address. The Court must revisit the issues in parental involvement statutes to (1) clearly establish the privacy rights of mature minors, and (2) undertake a thorough empirical examination of the physical and psychological risks and burdens associated with parental involvement statutes.

²³³ *See id.*

²³⁴ *See id.*

